R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–283 OF 2007
JAMES FOONG, SURIYADI AND AHMAD MAAROP JJCA
8 APRIL 2008

Arbitration — Agreement — Reference of dispute — Respondent's opposition to referring dispute to arbitration — Court's decision to have dispute litigated — Whether judge had erred in law and in fact in holding that dispute between parties could not be referred to arbitration — Whether cl 10 of insurance policy constituted an arbitration agreement within meaning of the Arbitration Act 1952 — Whether court had exclusive jurisdiction over dispute under cl 17 of insurance policy — Arbitration Act 1952 ss 6 & 12

The plaintiff/appellant ('appellant') was insured under a personal accident insurance cover ('the policy') that was provided by the defendant/respondent ('respondent'). When the appellant suffered a fall which injured him, he made a claim on the policy. However, the respondent rejected the appellant's claim citing as one of the reasons the fact that the appellant had failed to show that he suffered any 'permanent disability' as required under the policy. Thereafter the appellant sought to refer this disagreement to arbitration. In reliance on cl 10 of the policy the appellant applied for an order to appoint an arbitrator to carry out arbitration proceedings to resolve the dispute between them. The respondent however opposed this application and relied on cl 17 of the policy to plead that it had the right to have the dispute litigated through the courts. The appellant contended that his application fell within the ambit of s 12 of the Arbitration Act 1952 ('the Act'). The High Court decided that the respondent's silence was evidence of a want of agreement to refer the matter to arbitration and that the court's jurisdiction to appoint an arbitrator was conditional on the parties' agreement to submit disputes to arbitration. It therefore rejected the appellant's claim and opined that the appellant should have filed his claim in court if he felt aggrieved by the respondent's stance, which in the court's opinion was in line with s 6 of the Act. This was the appellant's appeal against that decision. It was the appellant's contention that the High Court judge had, inter alia, erred in law and in fact in holding that the dispute between the parties could not be referred to an arbitration; erred in not holding that cl 10 of the policy constituted an arbitration agreement within the meaning of the Act; and erred in holding that cl 17 of the policy was an agreement to submit any

dispute arising under the policy to court and that the court had exclusive jurisdiction over such a dispute.

Held, allowing the appeal with costs:

(1) Upon a plain reading of cl 10 of the policy it was sufficiently clear that the parties had agreed to resolve differences in respect of the policy of insurance between them by arbitration. The High Court judge had erred in law and fact when he decided that the respondent's objection to the arbitration, on the disagreement as to whether the appellant suffered permanent injury or not, could be equated as a disagreement to any referral to arbitration pursuant to s 6 of the Act, despite agreeing to resolve disputes under cl 10. Where the words of cl 10 of the policy were clear and were fulfilled then the dispute between the parties must proceed to arbitration. A dispute, difference or question had arisen in this case, when the respondent rejected the appellant's claim under the policy, which was followed by the disagreement by the appellant. Upon reading cl 10 of the policy with s 12 of the Act it was clear that the subsequent actions taken by the appellant, such as of putting to notice his intention to refer the matter for arbitration followed by his application to appoint an arbitrator, was merely an enforcement of his rights as agreed upon in cl 10 of the policy (see para 9).

(2) Clauses 17 and 10 of the policy could be read harmoniously since cl 17 was not an ambiguous clause that required any special attention. It merely read that the law governing the terms of the policy and its interpretation were to be governed by Malaysian law with the Malaysian court having the exclusive power to interpret it. As such, the clause did not confer upon the court the power to decide on their differences when the parties had already consented to resolve their disputes by arbitration (see para 8).

[Bahasa Malaysia summary

Plaintif/perayu ('perayu') telah dilindungi di bawah perlindungan insurans kemalangan peribadi ('polisi tersebut') yang disediakan oleh defendan/responden ('responden'). Apabila perayu terjatuh dan mengalami kecederaan, dia membuat satu tuntutan ke atas polisi tersebut. Walau bagaimanapun, responden menolak tuntutan perayu dengan menyatakan sebagai salah satu sebabnya fakta bahawa perayu telah gagal untuk menunjukkan dia mengalami sebarang 'ketidak upayaan kekal' seperti yang dikehendaki di bawah polisi. Seterusnya perayu memohon untuk merujuk percanggahan tersebut kepada timbangtara. Dengan bergantung kepada klausa 10 polisi tersebut perayu memohon satu perintah untuk melantik

penimbangtara untuk menjalankan prosiding-prosiding timbangtara bagi menyelesaikan pertikaian di antara mereka. Responden walau bagaimanapun menentang permohonan ini dan bergantung kepada klausa 17 polisi tersebut untuk memplid bahawa ia mempunyai hak untuk membolehkan pertikaian ini dilitigasikan melalui mahkamah-mahkamah. Perayu berhujah bahawa permohonannya terangkum di dalam lingkungan s 12 Akta Timbangtara 1952 ('Akta tersebut'). Mahkamah Tinggi memutuskan bahawa perbuatan berdiam diri responden adalah keterangan mengenai keinginan kepada persetujuan untuk merujuk hal tersebut kepada timbangtara dan bahawa bidang kuasa mahkamah untuk melantik penimbangtara adalah bersyarat kepada persetujuan pihak-pihak untuk mengemukakan pertikaian kepada timbangtara. Ia oleh itu menolak tuntutan perayu dan berpendapat bahawa perayu harus memfailkan tuntutannya di mahkamah jika dia merasa tidak puas hati dengan tindakan responden, yang mana pada pendapat mahkamah adalah selari dengan s 6 Akta tersebut. Ini adalah rayuan perayu terhadap keputusan tersebut. Ia adalah hujah perayu bahawa hakim Mahkamah Tinggi, antara lain, telah terkhilaf dalam undang-undang dan dalam fakta dalam memutuskan bahawa pertikaian di antara pihak-pihak terlibat tidak boleh dirujuk kepada timbangtara; terkhilaf dalam tidak memutuskan bahawa klausa 10 polisi tersebut merangkumi satu perjanjian timbangtara di dalam maksud Akta tersebut; dan terkhilaf dalam memutuskan bahawa klausa 17 polisi tersebut adalah satu persetujuan untuk mengemukakan sebarang pertikaian yang timbul di bawah polisi tersebut kepada mahkamah dan bahawa mahkamah mempunyai bidang kuasa eksklusif terhadap pertikaian sedemikian.

Diputuskan, membenarkan rayuan dengan kos:

(1) Setelah membaca secara biasa klausa 10 polisi tersebut ia adalah cukup jelas bahawa pihak-pihak tersebut telah bersetuju untuk menyelesaikan sebarang perbezaan berkaitan polisi insurans di antara mereka melalui timbangtara. Hakim Mahkamah Tinggi telah terkhilaf dalam undang-undang dan fakta apabila dia memutuskan penolakan responden terhadap timbangtara, di atas percanggahan sama ada perayu mengalami kecederaan kekal atau tidak, boleh disamakan dengan satu percanggahan kepada sebarang rujukan kepada timbangtara menurut s 6 Akta tersebut, walaupun bersetuju untuk menyelesaikan pertikaian di bawah klausa 10. Di mana perkataan-perkataan klausa 10 polisi tersebut adalah jelas dan ditepati maka pertikaian di antara pihak-pihak tersebut mesti diteruskan kepada timbangtara. Satu pertikaian, perbezaan atau soalan telah timbul di dalam kes ini, apabila responden menolak tuntutan perayu di bawah polisi, yang diikuti oleh percanggahan oleh perayu. Setelah membaca klausa 10 polisi tersebut bersama s 12 Akta tersebut ia adalah jelas bahawa tindakan-tindakan

selanjutnya yang diambil oleh perayu, seperti memberitahu niatnya untuk merujuk hal tersebut kepada timbangtara diikuti dengan permohonan untuk melantik penimbangtara, adalah hanya satu pelaksanaan haknya seperti yang dipersetujui di dalam klausa 10 polisi tersebut (lihat perenggan 9).

(2) Klausa-klausa 17 and 10 polisi tersebut boleh dibaca secara harmoni memandangkan klausa 17 bukan satu klausa yang samar-samar yang memerlukan perhatian khas. Ia hanya menjelaskan bahawa undang-undang yang mengawal terma-terma polisi tersebut dan tafsirannya adalah dikuasai oleh undang-undang Malaysia dengan mahkamah Malaysia mempunyai kuasa eksklusif untuk mentafsirkannya. Oleh itu, klausa tersebut tidak memberi kepada mahkamah kuasa untuk memutuskan mengenai perbezaan-perbezaan mereka apabila pihak-pihak terlibat telah bersetuju untuk menyelesaikan pertikaian mereka melalui timbangtara (lihat perenggan 8).]

Notes

For cases on reference of dispute, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1222–1231.

Cases referred to

Chiew Swee Chai v British American Insurance Co (M) Sdn Bhd [1987] 1 MLJ 53, HC (refd)

Malaysian Steel Works Kuala Lumpur Sdn Bhd v Kam Seng Machine Works Pte Ltd [2003] 6 AMR 15, HC (refd)

Salutary Avenue (M) Sdn Bhd v Malaysian Shipyards and Engineering Sdn Bhd and Anor [2000] 7 MLJ 620, HC (refd)

Willesford v Watson LR (1873) 8 Ch App 473 (refd)

Legislation referred to

Arbitration Act 1952 ss 6, 12

Appeal from: Originating Summons No 24–3508 of 2006(4) (High Court, Johor Bahru)

R Paramanandan (C Sankaran & Co) for the appellant.
TH Liew (TH Liew & Partners) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] On 31 March 2008 this panel heard the appeal and had allowed it with costs. The facts of the case are as follows. The defendant, hereinafter referred

to as the respondent had provided a personal accident insurance cover for the plaintiff (hereinafter referred to as the appellant) under policy No 403142 on terms and conditions set out in the policy. On 23 May 2001 the appellant had a fall which injured him and from this he subsequently made a claim on the policy. The respondent had rejected the claim, for reasons, inter alia, on the ground that the appellant had failed to show that he suffered 'permanent disability' as defined by the policy. The appellant disagreed and sought to refer the matter to arbitration. He had filed an originating summons for an order to appoint one Dr Clarence Edwin or someone suitable to act as an arbitrator, to carry out arbitration proceedings, as permitted by the insurance policy to resolve the dispute between them.

[2] The appellant contended that the application fell within the ambit of s 12 of the Arbitration Act 1952. This provision reads as follows:

> In any of the following cases —
>
> (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
>
> (b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
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> (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;
>
> (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,
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> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[3] The basis for the application was cl 10 of the policy, which read:

A Any dispute, difference or question which may arise at any time hereafter between the Company and the Insured touching the true construction of the Policy or the rights or liabilities of the parties hereto shall be the decision of a single arbitrator of Malaysia to be agreed upon by the parties or in default of agreement for 14 days to be appointed in accordance with the subject to the provisions of the Arbitration B Act 1952 or any statutory modification or re-enactment thereof for the time being in force.

[4] Regretfully the respondent had declined to have the matter arbitrated C and relied on cl 17 of the policy which reads:

This policy shall be governed by and interpreted in accordance with Malaysian Law. The Malaysian Courts shall have exclusive jurisdiction.

D **[5]** The respondent had pleaded that the effect of cl 17 was that it had the right to have the dispute litigated through the courts. The High Court agreed with this stance and opined that the appellant should have filed his claim in court if he felt aggrieved by the respondent's stance. The court concluded E thus as its jurisdiction to appoint an arbitrator was conditional on the parties' agreement to submit disputes to arbitration. The rejection of the appellant's claim and the silence by the respondent to the referral to arbitration as submitted by parties, was evidence of that want of agreement to refer the matter for arbitration. The respondent's stance was in line with s 6 of the F Arbitration Act, which reads:

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, *in respect of any matter agreed to be referred to arbitration* any party to the legal proceedings may, before taking any G other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may H make an order staying the proceedings.

(Emphasis added.)

I **[6]** The main grounds of the appeal reflected the grievances of the appellant which stated, amongst others, that the High Court judge had erred:

(1) in law and in fact in holding that the dispute between the appellant and the respondent could not be referred to arbitration regardless of cl 10 of the policy;

(2) in holding that there was no agreement between the appellant and respondent to refer disputes arising under the policy of insurance to arbitration;

(3) in not holding that cl 10 of the policy insurance constituted an arbitration agreement within the meaning or the Arbitration Act;

(4) in holding that cl 17 of the policy of insurance was an agreement to submit any dispute arising under the policy of insurance to court and that the court had exclusive jurisdiction over any such dispute;

(5) in failing to hold that any ambiguity in the terms of a standard form policy of insurance must be resolved in favour of the insured applying the contra proferentum rule of interpretation; and

(6) in holding that cl 17 of the policy of insurance was a jurisdiction clause and a choice of law clause.

[7] This panel had unanimously allowed the appeal with costs with the deposit returned to the appellant. Our reasons were as follows. We found that by virtue of cl 10 of the insurance policy the parties had agreed to resolve differences in respect of the policy of insurance between them by arbitration. A plain reading of that clause was more than sufficient for us to arrive at that conclusion. To have arrived at the decision that the objection by the respondent to arbitration, merely on the disagreement by the respondent whether the appellant suffered permanent injury or not, despite agreeing to resolving disputes under cl 10, could be equated as disagreement to any referral to arbitration pursuant to s 6 of the Arbitration Act, was an error of fact and law committed by the learned High Court judge. It was exacerbated further when the judge had construed that 'In fact both parties have agreed to submit their disputes to the courts'.

[8] We had decided that cl 17 of the policy did not confer upon the court to decide on such differences when the parties had already consented to resolve them by arbitration. This policy merely read that the law governing the terms of the policy and the interpretation was to be governed by Malaysian law with the Malaysian court having the exclusive power to interpret it. There was nothing ambiguous about this clause that required any special attention or permitted a construction that should be favourable to the respondent (the contra proferentum rule). Clauses 17 and 10 could be read harmoniously.

[9] We had concluded that when the conditions in cl 10 of the policy were fulfilled then arbitration must proceed. In other words 'where the words of the policy are crystal clear … the sanctity of the contract should be upheld' (*Chiew Swee Chai v British American Insurance Co (M) Sdn Bhd* [1987] 1

MLJ 53). To clarify this statement, for starters we were satisfied that a valid arbitration agreement had been executed by the contending parties. A dispute, difference or question had arisen when the respondent had rejected the claim followed by the disagreement by the appellant. With the essential conditions for arbitration satisfied, and reading the above cl 10 with s 12 of the Arbitration Act, what else was there left but to proceed with the agreed course of action. The subsequent action by the appellant, when he put to notice his intention to refer the matter for arbitration, followed by the originating summons was merely an enforcement of his rights as agreed upon in cl 10 (*Salutary Avenue (M) Sdn Bhd v Malaysian Shipyards and Engineering Sdn Bhd and Anor* [2000] 7 MLJ 620, *Malaysian Steel Works Kuala Lumpur Sdn Bhd v Kam Seng Machine Works Pte Ltd* [2003] 6 AMR 15). To wind it up, in *Willesford v Watson* (1873) LR 8 Ch App 473, Lord Chancellor Selborne had observed:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a prima facie duty is cast upon the courts to act upon such an agreement. The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain of that part if their contract is carried into effect.

[10] Founded on all the above reasons we had unanimously allowed the appeal with costs. The deposits were ordered to be returned to the appellant.

[11] My learned brothers Dato' James Foong Cheng Yuen JCA and Dato' Ahmad Haji Maarop JCA in principle have agreed to the draft.

Appeal allowed with costs.

Reported by K Nesan